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No. 79-1895

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

ALLIED CHEMICAL CORPORATION, ET AL.,
Petitioners,

v.

DAIFLON, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Tenth Circuit

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REPLY MEMORANDUM FOR THE PETITIONERS

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REPLY MEMORANDUM FOR THE PETITIONERS

The court of appeals' use of mandamus to overturn the district court's new trial order does not involve the application of settled mandamus principles to the unique facts of this case, as respondent contends; it represents a drastic departure from those principles—a departure that has most damaging consequences for the administration of justice.

1. In respondent's view (Br. in Opp. 37), all that the court of appeals has done here is to hold that the district court failed to set forth sufficient reasons for having ordered a new trial as to liability and that the order, to that extent, involves a "clear abuse of discre-

tion" correctable on mandamus. Accepting this view does not make the court of appeals' decision more tenable or lessen the importance of review by this Court.

The court of appeals did not even attempt to reconcile its holding with Rule 52(a) of the Federal Rules of Civil Procedure, which provides clearly that a new trial motion is not one that requires any supporting findings of fact or conclusions of law. *See, e.g.,* 5A Moore, *Federal Practice* § 52.08 (1979-80 Supp.), and cases cited therein. Neither can the court of appeals' decision be reconciled with this Court's decision in *Platt* v. *Minnesota Mining & Mfg. Co.,* 376 U.S. 240 (1964), which is discussed at length in the petition (Pet. 26-27) but is not even cited in respondent's brief in opposition. *Platt* prohibits the courts of appeals from undertaking on mandamus a *de novo* examination of the record and exercising discretionary functions committed to the trial court. 376 U.S. at 245. This means that, at most, the court of appeals should have remanded this case to the district court. A remand would have permitted the district court to give a more complete statement of its reasons for ordering a new trial as to liability, and permitted that court to rule on the additional grounds for a new trial not addressed in the original new trial order. *See* Pet. 26 n. 23.

The writ issued by the court of appeals, which is not based on a factual record yet opines on the sufficiency of the liability evidence adduced by the plaintiff, can only add ambiguity and complexity to the further trial proceedings. For example, if the jury at the second trial finds damages, may the defendants then ask for a ruling on the liability issues raised in their original new trial motion ~~by~~ but not yet dealt with

by the district court? Further, if after having the benefit of a complete record of the first trial, the court of appeals concludes that the evidence is insufficient to establish liability, yet another trial will be needed.

It was because of problems such as these that Congress enacted the final judgment rule, and this Court steadfastly has required adherence to it. As this Court cautioned in *Kerr* v. *United States District Court,* 426 U.S. 394, 403 (1976), "[a] judicial readiness to issue a writ of mandamus in anything less than an extraordinary situation would run the real risk of defeating the very policies sought to be furthered by [the] judgment of Congress" embodied in the final judgment rule. If permitted to stand, the court of appeals' decision in this case would, in effect, eviscerate the final judgment rule by inviting litigants to obtain immediate review of interlocutory orders (including new trial orders) by the simple expedient of casting their arguments in terms of an "abuse of discretion."

2. Respondent simply is in error in suggesting (Br. in Opp. 16-28) that this Court has endorsed use of an abuse of discretion standard on mandamus. There can be no doubt of the discretionary nature of the decision to award or deny a new trial, or that the court that presided over the taking of evidence is in a better position than an appellate court to weigh the issues raised by a new trial motion. *See, e.g.,* 11 Wright & Miller, *Federal Practice and Procedure* §§ 2801 and 2803 (1973), and cases cited therein. Respondent does not, and could not, contend otherwise. Only two Terms ago, Mr. Justice Rehnquist admonished in *Will* v. *Calvert Fire Insurance Co.,* 437 U.S. 655, 665-66 (1978) (plurality opinion), that "[w]here a matter is com-

mitted to the discretion of a district court, it cannot be said that a litigant's right to a particular result is 'clear and indisputable' "—one of the essential prerequisites to issuance of the writ.

Respondent's reliance (Br. in Opp. 18-20) upon *Bankers Life & Casualty Co.* v. *Holland,* 346 U.S. 379 (1953), *La Buy* v. *Howes Leather Co.,* 352 U.S. 249 (1957), and *Schlangenhauf* v. *Holder,* 379 U.S. 104 (1964), to support use of an abuse of discretion standard on mandamus is misplaced. This Court refused in *Bankers Life* to permit mandamus to be used to review a severance and transfer order. In so doing, this Court noted that the district court had jurisdiction to enter the order, so that the order—"even if erroneous —* * * involved no abuse of judicial power [citing *Roche* v. *Evaporated Milk Assn.,* 319 U.S. 21 (1943)] * * *" (346 U.S. at 382). It is undisputed that the district court had jurisdiction to issue the new trial order challenged in this case; thus, it cannot be said that the order involves an "abuse of judicial power" (*Bankers Life & Casualty Co.* v. *Holland, supra*) or that the result requested by the plaintiff and granted by the court on mandamus is "clear and indisputable" (*Will* v. *Calvert Fire Insurance Co., supra*).

This Court approved issuance of a writ of mandamus in *La Buy* to halt respondent's repeated practice of referring cases to trial before a master. In view of the exceptional circumstances presented by the case, this Court concluded that the referral orders "amounted to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation" (352 U.S. at 256). Unlike *La Buy,* there can be no

claim here that the district court failed to exercise a judicial function within its jurisdiction.[1]

Finally in *Schlagenhauf* v. *Holder*, this Court held that the court of appeals had acted properly in entertaining a petition for a writ of mandamus "on a substantial allegation of usurpation of power in ordering [multiple physical and mental examinations] of a defendant, an issue of first impression that called for the construction and application of Rule 35 [of the Federal Rules of Civil Procedure] in a new context" (379 U.S. at 111). At the same time, however, this Court cautioned against the use of mandamus to consider

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[1] In Will v. United States, 389 U.S. 90, 104 n. 14 (1967), this Court pointed out that *La Buy* "is simply inapposite where there is no showing of a persistent disregard of the federal rules." The court of appeals made no such finding in the present case.

Respondent suggests in its brief in opposition (pp. 4, 24, 30-31) that mandamus was appropriate here because of comments and actions by the district judge allegedly reflecting bias against respondent. These charges are particularly surprising in view ~~if~~ of the fact that, although similar charges appear in respondent's papers to the court of appeals, respondent's counsel expressly disavowed them during oral argument on the mandamus petition. The suggestion of bias is, moreover, completely unfounded.

The district court's statement in ordering a new trial that it would entertain a request for further discovery was for respondent's benefit—not petitioners'. Respondent had paid no attention during discovery to the difference between the authenticity of a document and its status as a business record. In the context of the new trial order, the suggestion of further discovery was simply an opportunity for respondent to patch up its record and get testimony it needed as a proper foundation for its documentary evidence. As for the 1974 dismissal of respondent's case, respondent implies that the unanswered interrogatory for which its case was dismissed was one important item among many. In fact, it was a key interrogatory to search out respondent's costs. This Court affirmed the dismissal of a case for failure to answer just such an interrogatory in National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976) (per curiam).

"any future allegation that the District Court was in error in applying [the guidelines established by the Court] to a particular case * * *" (*id.* at 112).[2]

Thus, although the phrase "clear abuse of discretion" appears in this Court's opinions in *Bankers Life, La Buy* and *Schlagenhauf,* this Court has never approved issuance of a writ of mandamus on such a basis. Moreover, more recent opinions of the Court have cautioned the courts of appeals against being "misled by labels such as 'abuse of discretion' * * * into interlocutory review of nonappealable orders * * *" (*Will* v. *United States, supra,* 389 U.S. at 98 n. 6).[3] The time and resources that have been consumed by

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[2] This Court stated in Will v. United States, *supra,* that although the majority opinion in *Schlagenhauf* "did note that the various questions concerning the construction of Rule 35 were new and substantial, * * * it rested the existence of mandamus jurisdiction squarely on the fact that there was real doubt whether the District Court had any power at all to order a defendant to submit to a physical examination" (389 U.S. at 105 n. 14). Again, no question has been or could be raised in the present case concerning the district court's jurisdiction to order a new trial.

[3] Respondent, like the court of appeals, has read this Court's decision in Will v. Calvert Fire Insurance Co., *supra,* as repudiating use of a "plain abuse of discretion" standard on mandamus. Br. in Opp. 27; Pet. App. A, p. 10a. Both go on, however, to assert that *Will* permits issuance of the writ to correct a "clear abuse of discretion." *Ibid.* Neither respondent nor the court of appeals has attempted to distinguish between a "clear" and "plain" abuse of discretion. Obviously, no rational distinction is possible. As the decision in this case makes all too apparent, if the courts of appeals are permitted on mandamus to search for possible error in discretionary determinations by trial courts, the courts will have little difficulty in characterizing any determination with which they disagree as involving either a "clear" or "plain" abuse of discretion. If that occurs, the decision in *Will* and other similar cases will have been deprived of any meaning, and the standard for review on mandamus will be identical to the standard appropriately used on direct appeal from a final order.

the present proceeding, the unattractiveness of permitting district courts to be transformed into litigants, and the confusion that has been caused by the court of appeals' order regarding the scope and nature of future proceedings in this case, graphically illustrate the dangers associated with use of an abuse of discretion standard on mandamus.[4]

3. Finally, even if this Court were disposed to permit courts of appeals routinely to overturn new trial orders on mandamus for asserted abuse of discretion, the court of appeals' application of that standard to this case is wholly unwarranted. In concluding that the district court abused its discretion in ordering a new trial as to liability, the court of appeals attached no significance whatsoever to the district court's finding that it had committed serious legal error in admitting exhibits into evidence. *See* Pet. App. A, pp. 27a-28a; *see also* Pet. 22. That finding is complete justification for a new trial on liability. If the court of appeals was troubled by the district court's failure to provide a comprehensive listing of the exhibits that had been admitted improperly, it could and should have remanded the case to the district court for a more complete statement of findings concerning the evidentiary errors that had occurred. Obviously, a detailed discussion of the sufficiency of the evidence, for the absence of which the court of appeals excoriated the trial judge, was quite unnecessary in light of the

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[4] Respondent's efforts (Br. in Opp. 29-31) to minimize the square conflict between the Tenth Circuit's decision in this case and the Eighth Circuit's decision in General Motors Corp. v. Lord, 488 F.2d 1096 (1973), are unavailing. Respondent's allegations of bias by the district court reflect a win-at-all-costs attitude that disserves both respondent and the district court. *See* discussion at note 1, *supra; see also* Pet. 20.

latter's acknowledgement that there had been serious error in the admission of evidence on liability. *See* Pet. 22-23.

The court of appeals also improperly construed the district court's denial of defendants' motion for judgment n.o.v. as constituting an acknowledgement that the evidence established defendants' liability. Pet. App. A, p. 19a. The court thus ignored the fact that decidedly different standards apply to motions for judgment n.o.v. and for a new trial. *See* Pet. 26 n. 22. The court of appeals also substituted its own assessment of the evidence for the views of the district court, even though it did not have before it a single page of the trial transcript or more than a handful of the trial exhibits.[5] The direct result is a decision that ~~it~~ incontrovertibly in error on pivotally important issues of facts (*see* Pet. 25 n. 21), improperly invades the province of the trial court and undermines the orderly administration of justice.

In sum, if the grant or denial of a new trial is to remain a function of the trial court that has heard the evidence in its entirety, the writ issued by the court of appeals based upon incomplete knowledge of the evidence should be summarily reversed and this case

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[5] Respondent's statement (Br. in Opp. 12 n. 10) that the defendants did not object to the court of appeals' reliance on "narrative" statements concerning liability, prepared independently by the parties, is in error. In the introduction to their "narrative" statement, defendants pointed out that the court of appeals could not properly consider liability issues on mandamus. Then, shortly after the "narrative" statements had been filed, defendants submitted a letter to the court of appeals objecting additionally to that court's reliance on anything less than a complete record (which was not then available because substantial portions of the trial proceedings had not been transcribed) as to liability.

should be remanded for a new trial, not only as to damages which will be necessary in any event, but also as to liability, as the trial court ordered.

Respectfully submitted.

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